Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
Jurisdictional Separations and Referral	)	CC Docket No. 80-286
To the Federal-State Joint Board	)	
	)	
Petition by Pioneer Telephone	)	
Cooperative, Inc. For Waiver of	)	
47 C.F.R. Sections 36.3, 36.123-126,	)	
36.141, 36.152-157, 36.191 and	)	
36.372-382 to Unfreeze Part 36	)	
Category Relationships	)	

COMMENTS OF PIONEER TELEPHONE COOPERATIVE, INC.

Pioneer Telephone Cooperative, Inc. ("Pioneer") files its comments in response to the most recent Further Notice of Proposed Rulemaking ("FNPRM") in this proceeding.[1] Pioneer is particularly interested in this proceeding because its Petition to unfreeze its category relationships has been pending before the Commission for almost five and one half years.[2]

Pioneer does not object to the Commission's proposals to further extend the freeze of jurisdictional separations factors or to providing an opt-out option in 2019 for other carriers who elected to freeze their category relationships in 2001. However, when Pioneer filed its waiver Petition in 2013, the Commission had already granted waivers to two other carriers who had

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1 *In the Matter of Jurisdictional Separations and Referral to the Federal-State Joint Board*, CC Docket No. 80-286, Further Notice of Proposed Rulemaking, FCC 18-99 (July 18, 2018) (*FNPRM*). 83 Fed. Reg. 35582, Jul. 27, 2018.

2 Petition by Pioneer Telephone Cooperative, Inc. For Waiver of 47 C.F.R. Sections 36.3, 36.123-126, 36.141, 36.152-157, 36.191 and 36.372-382 to Unfreeze Part 36 Category Relationships, filed Mar. 22, 2013 ("Petition").

substantially similar conditions. Consistent with its obligations under the Communications Act,[3] the Administrative Procedure Act[4], relevant court decisions[5] and proper administration of its own rules, the Commission should act promptly to grant Pioneer's Petition.

I The Commission Cannot Lawfully Further Delay Action on Pioneer's Petition

A. Pioneer's Decision To Freeze Its Category Relationships Justifiably Relied On The Commission's Statement That The Freeze Would Last Five Years Or Less.

In its 2001 Report and Order adopting, *inter alia*, a freeze of jurisdictional allocation factors for rate-of-return carriers with an option to freeze their category relationships as well the Commission stated the freeze would be in effect "for five years…, or until the Commission has completed comprehensive reform of the Part 36 separations rules, *whichever comes first.*"[6] The option for rate-of-return carriers to freeze their category relationships was adopted in order to

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3 47 U.S.C. 154(j) ("The Commission may conduct its proceedings in such a manner as will best conduce to the proper dispatch of business and to the ends of justice….")

4 5 U.S.C. 555(b) ("With due regard for the convenience and necessity of the parties…and *within a reasonable time,* each agency shall proceed to conclude a matter presented to it." (emphasis added); 5 U.S.C. 706(1) (court may compel agency action "unlawfully withheld or unreasonably delayed.")

5 *TRAC v. FCC,* 750 F.2d 70 (D.C. Cir. 1984) ("…[S]ection 706(1) coupled with section 555(b) does indicate a congressional view that agencies should act within reasonable time frames."); *MCI Telecommunications Corp. v. FCC,* 627 F.2d 322 (D.C.Cir.1980); ("delay in the resolution of administrative proceedings can also deprive regulated entities, their competitors or the public of rights and economic opportunities without the due process the Constitution requires."); *Nader v. FCC,* 520 F.2d 182 (D.C.Cir.1975) ("we foresee the breakdown of the regulatory process if the public and the regulated carriers must wait as long as ten years to have important issues decided.") *Smith v. Illinois Bell*, 270 U.S. 587, 591-92 (1926) ("… [T]he (Illinois) Commission's] conduct evinces an entire lack of that acute appreciation of justice which should characterize a tribunal charged with the delicate and important duty of regulating the rates of a public utility with fairness to its patrons, but with a hand quick to preserve it from confiscation. Property may be as effectively taken by long-continued and unreasonable delay.…")

6 *In the Matter of Jurisdictional Separations and Referral to the Federal-State Joint Board,* CC Docket No. 80-286, Report and Order, 16 FCC Rcd 11382 (2001)("Freeze Order" or "Order"), para. 9 (emphasis added). The Order did note a comment that a freeze could fail to properly allocate future costs as they arise. *Id.*, para. 10.

give each such carrier "the flexibility to decide *based on its own circumstances and investment plans,* whether a freeze of its category relationships will be beneficial."[7]

The Order dismissed concerns that the initial five year freeze was so long that the freeze would become a *de facto* rule.[8] The Order raised the possibility that the freeze could be extended and stated any extension would be based on whether comprehensive separations reform had occurred.[9] The Commission has, indeed, extended the freeze 7 times for a total of 12 additional years.[10] In its 2014 extension Report and Order, the Commission dismissed Pioneer's concern that extending the freeze without granting its Petition would perpetuate the misallocation of its expenses and investment, stating that extending the freeze did not affect its ability to address pending waiver petitions.[11] Pioneer's comment, however, had not questioned the Commission's authority to act but rather its willingness to act. The passage of more than four more years validate that concern and demonstrates that the dismissal of Pioneer's comment had no rational basis.

The result of these serial extensions is that more than 17 years after adoption the freeze has become the rule, whether *de facto* or *de jure,* and the Commission and the Joint Board are no closer to comprehensive reform than they were when the Order was adopted in 2001. Because the proposal to extend the freeze for another 15 years, will take it to a total of 32 years, which

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[7] *Id.*, at para. 21 (emphasis added)

[8] *Id.*, at para 28.

[9] *Id.*, at para. 29

[10] *In the Matter of Jurisdictional Separations and Referral to the Federal-State Joint Board,* CC Docket No. 80-286, Order and Further Notice of Proposed Rulemaking, 21 FCC Rcd 5516, 5523 (2006) ("2006 Extension"); Report and Order, 24 FCC Rcd 6162 (2009); Report and Order, 25 FCC Rcd 6046 (2010); Report and Order, 26 FCC Rcd 7133 (2011); Report and Order, 27 FCC Rcd 5593 (2012); Report and Order, 29 FCC Rcd 6470 (2014); Report and Order, 32 FCC Rcd 4219 (2017).

[11] 2014 Report and Order at para. 14.

will be one third of the time the Commission will then have existed, makes clear that the Commission does not expect separations reform ever to occur.

To the extent any carrier, upon evaluation of its circumstances and investment plans, should have made its decision whether to agree to freeze its category relationships with the understanding that the Commission might extend the freeze, it cannot be said that a carrier should have reasonably expected that a five year freeze would become a 17 year freeze. Such an extension was not predictable given the wide knowledge that the rate of change in the industry was accelerating. It is unreasonable and contrary to facts regarding which the Commission is the designated "expert agency" [12] to continue to refuse to act in 2018 on a waiver petition where the Petitioner made its choice among optional rules based on its 2001 estimate of its *own circumstances and investment plans.*

B. The Commission's failure to act on Pioneer's Petition is inconsistent with its duty to adapt continually to the changing communications market.

For the first several years Pioneer found the freeze continued to be beneficial. However, after more than 10 years had passed the business and social environment for rural telephone companies had changed radically, retail and wholesale customers demanded a new mix of services which, in turn, required substantial additional investment different from that predictable in 2001.

The Commission has repeatedly recognized in many proceedings besides this one the major changes in the telecommunications and information industries that have occurred since the Order was adopted in 2001. In its 2011 *Transformation Order,* for example, the Commission determined major changes were needed to its intercarrier compensation and Universal Service

[12] 47 U.S.C. 151, 218.

rules because: "Networks that provide only voice service, however, are no longer adequate for the country's communication needs…. Fixed and mobile broadband have become crucial to our nation's economic growth, global competitiveness, and civic life."[13]

In this proceeding the Commission recognizes that significant changes in the industry can result in misallocation of investment and expenses and cites the comments of many parties to that effect.[14] Pioneer is not, however, concerned that the failure to allow it to adjust to a changing market reduces its "incentives" to adequately serve its members.[15] As a subscriber-owned cooperative Pioneer's core mission is to provide the best possible telecommunications and information services, but it cannot do so without adequate revenue and cannot fairly allocate the costs between different users if regulation forces it to operate as if it were still 2001.

The FNPRM requests affected carriers to provide financial impacts of the misallocation of investment and expenses. In a series of *ex parte* meetings over the last five years Pioneer has provided and updated detailed information on the effects of the freeze.[16] Those recent impact statements remain valid, if not more adverse. Given the extensive opportunity of the staff, and

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13 *In the Matter of Connect America Fund*, Report and Order and Further Notice of Proposed Rulemaking, 26 FCC Rcd 17663, paras 2-3, (2011).

14 FNPRM at paras. 23,24.

15 FNPRM at para. 23.

16 Letters from David Cosson, Pioneer, to Marlene H. Dortch, FCC, Apr. 26, 2013; Sep. 7, 2013; Feb. 7, 2014; Mar. 21, 2014; Sep. 25, 2014; Nov. 13, 2014; Dec. 22, 2014; Mar. 12, 2015; Apr. 22, 2015; Nov. 9, 2015; Nov. 16, 2015; Jan. 22, 2016; Feb. 29, 2016; Mar. 11, 2016; Mar. 15,2018; Letter from Mary J. Sisak, Terral Tel. Co. and Pioneer, to Marlene H. Dortch, FCC, Mar. 12, 2014.

other parties pursuant to the terms of a Protective Order,[17] to evaluate that data, there is no reason for the Commission to delay acting on Pioneer's Petition.

C. Pioneer has shown "good cause" for grant of its waiver.

The FNPRM asks what facts and circumstances should be considered in addressing potential waivers if the "opt-out" proposal is not adopted.[18] The Commission's authority to waive its rules is grounded in the commonsense notion that rules should not be applied where the result is contrary to the purpose of the rule.[19] The purpose of allowing carriers to "opt-in" to a freeze of their category relationships in 2001 was to provide them an opportunity for "simplification and stability."[20] Carriers were given flexibility to decide, but that decision was necessarily based on the circumstances they could reasonably forecast in 2001. As Pioneer has repeatedly demonstrated, the passage of 17 years in a rapidly changing industry necessarily means that no carrier's 2001 forecast is likely to be currently valid and the net benefits of simplification and stability no longer exist. Thus the purpose of the rule is disserved by failure to grant a waiver.

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[17] *Petition by Pioneer Telephone Cooperative, Inc. Pursuant to 47 C.F.R. Sections 36.3, 36.123-126, 36.141, 36.152-157, 36.191, and 36.372-382 for Commission Approval to Unfreeze Part 36 Category Relationships,* Protective Order, CC Doc. No. 80-286 (WCB 2013)

[18] FNPRM at 35.

[19] *Wait Radio v. FCC,* 418 F.2d 1153, 1157 (D.C. Cir. 1969) ("The agency's discretion to proceed in difficult areas through general rules is intimately linked to the existence of a safety valve procedure for consideration of an application for exemption based on special circumstances.").

[20] Freeze Order at para. 21.

D. Pioneer has agreed to accept conditions to preclude double recovery

The FNPRM raises the question of double recovery of costs through end user charges and Connect America Fund intercarrier compensation support.[21] Throughout the pendency of its Petition Pioneer has agreed that it should not double-recover its costs and will agree to the conditions imposed in the *Eastex* waiver order in that respect.[22]

II Pioneer Does Not Object To The Proposed Freeze Extension If Its Petition Is Granted.

The FNPRM proposes to extend the freeze for an additional 15 years, but with a one-time option for carriers with frozen category relationships to unfreeze them effective July 1, 2019.[23] The Commission correctly observes that with the current freeze due to expire at the end of the year, its only options are further extension or allowing the pre-2001 rules to again become effective. Since the time remaining is insufficient for the industry to return to operating under those rules, the only practical option is to once again extend the freeze. Pioneer further agrees that all carriers with frozen category relationships should be able to unfreeze them. An opt-out opportunity for carriers that have not filed waiver petitions is probably more cost effective for some carriers and the Commission than filing and processing additional waivers. For all the reasons Pioneer has put forth over the last five years, carriers should no longer be required to operate under rules that addressed the industry as it was foreseeable in 2001. However, the two carriers that have incurred substantial expense and demonstrated their individual impacts through the waiver process should not be required to wait another 10 months for Commission action that is overdue by any reasonable or legal standard.

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21 FNPRM at paras. 28-31.

22 *See, e.g.* Letter from David Cosson to Marlene Dortch, CC Doc. No. 80-286, Jan. 22, 2016.

23 FNPRM at paras 16-22, 23-37.

III CONCLUSION

Although Pioneer has no objection to the proposed actions described in the FNPRM, the pendency of those proposals must not be taken as an excuse for further delay of action on Pioneer's Petition filed five and one half years ago. Pioneer has repeatedly demonstrated good cause for grant of its waiver including that failure to act is contrary to the purpose of the rule and the Commission's stated goals of rapid deployment of broadband services for consumers and businesses, that similarly situated carriers have been granted waivers, and the negative implications for any future Commission option for regulated entities coupled with a statement that an opt-in will terminate on or before a designated date.

Respectfully submitted,

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August 27, 2018